Supreme Court, U.S.
FILED

10-436 SEP 21 2010

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI VOLUME II – APPENDIX

Stacy L. Zoern*
Kurt M. Sauer
Daffer McDaniel LLP
700 Lavaca Ste. 720
Austin, Texas 78701
(512) 476-1400

* *Counsel of Record* *Attorneys for Petitioner*

TABLE OF APPENDICES

Page

Appendix A 2a

May 30, 2006 Amended Opinion of the Hearing Officer of the Administrative Due Process Hearing

Appendix B 37a

March 31, 2008 Decision of the United States District Court for the Eastern District of Texas and Associated Report and Recommendation

Appendix C 62a

May 27, 2010 Opinion of the United States Court of Appeals for the Fifth Circuit

Appendix D 85a

June 10, 2010 Petition for Panel Rehearing to the Court of Appeals for the Fifth Circuit

Appendix E 108a

June 25, 2010 Denial of the Petition for Panel Rehearing by the Court of Appeals for the Fifth Circuit

APPENDIX

APPENDIX A – AMENDED OPINION OF THE DUE PROCESS HEARING OFFICER DECIDED MAY 30, 2006

DOCKET NO. 108-SE-0106

R. H.		BEFORE A SPECIAL
b/n/f M.H. & E.H.	§	EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	FOR THE
PLANO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	ST ATE OF TEXAS
	§	

AMENDED DECISION OF HEARING OFFICER

Statement of Case

On January 25, 2006, R. H., by next friends, M. H. and E. H., ("Petitioner") filed this request for due process hearing under the Individuals with Disabilities Education Improvement Act ("IDEA 04"), 20 U.S.C. § 1400 *et seq.*, against the Plano Independent School District ("Respondent" or "District") and alleged that Respondent failed to provide Petitioner with a free appropriate public education ("FAPE"). Petitioner was represented by Myrna H. Silver, attorney at law. Nona C. Matthews, of the law firm, Walsh, Anderson, Brown, Schulze & Aldridge, P.c., appeared on behalf of Respondent.

After a pre-hearing conference on February 27, 2006, a Pre-Hearing Order was issued. At the request of Petitioner for certain specific changes to his claims and issues, an Amended Pre-Hearing Order was issued that incorporated those changes. The due process hearing convened on April 4, 2006, and

continued on April 6 and 7, 2006. Following the presentation of each party's case, the parties filed written closing arguments, and by their agreement, the decision due date in this matter was set for May 31, 2006 in compliance with the forty-five day rule.

Petitioner made the following claims against the District:

1. The District acted in bad faith and failed to comply with an agreement reached by the parties at a resolution session in a prior due process complaint;
2. In January, 2005, the District offered and placed Petitioner in its PPCD program at Beaty Early Childhood Center and failed to consider the full spectrum of educational programs available to Petitioner during the spring semester, 2005;
3. Although prior to Petitioner's enrollment in the District, Petitioner received occupational therapy ("OT") from Early Childhood Intervention ("ECI"), and although Petitioner's private evaluations recommended OT, the District failed to consider the provision of occupational therapy ("OT") to Petitioner and failed to provide OT to Petitioner;
4. During the 2005-2006 school year, the District failed to provide an appropriate length of school day to Petitioner;
5. The District offered an inappropriate educational program to Petitioner in that a portion of the program included no peers of Petitioner, and the District did not offer a staff person with appropriate certification, namely an occupational therapist, to address Petitioner's feeding skills;
6. The District failed to offer or provide an appropriate speech therapy ("ST") program to

Petitioner in that it offered an inadequate amount of one to one speech therapy;
7. In the spring semester, 2005, the District failed to address in-home training;
8. The District failed to consider Extended School Year ("ESY") services to Petitioner in the summer, 2005; and
9. The District failed to properly evaluate Petitioner's need for physical therapy ("PT"), failed to consider the provision of PT to Petitioner, and failed to consider or follow the recommendations of a private PT evaluation that recommended PT for Petitioner.

Based on the above claims, the following issues were adjudicated at hearing:

1. Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement;
2. For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate;
3. Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of FAPE to Petitioner; and
4. Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.

Petitioner requested the following relief in this proceeding:

1. An order directing the District to reimburse Petitioner's parents for all tuition and fees incurred at Petitioner's current private school from the end of May, 2005 to the present, and an order directing the District to pay for tuition and fees incurred prospectively by Petitioner until Petitioner begins kindergarten in the fall semester, 2008;

2. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT, and PT evaluations in the summer, 2005;

3. An order directing the District to reimburse Petitioner's parents for expenses incurred for ST provided by Valerie Sherman from September, 2005 to the present time, and an order directing the District to pay for such ST services conducted prospectively on a year round basis, such ST being on a one-to-one basis in an amount of two, 30 minutes sessions per week, until Petitioner begins kindergarten at the District or until it is determined that Petitioner no longer needs such therapies; and

4. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT and PT by Advanced Therapy Services from May, 2005 to the present time, and an order directing the District to pay for such ST, OT, and PT services conducted prospectively on a year round basis until Petitioner begins kindergarten at the District or it is determined that Petitioner no longer needs such therapies.

Findings of Fact

1. R. H. is a four-year-old child, and resides with his parents within the geographical boundaries of the District. [Petitioner Exhibit 1 and 2]

2. Petitioner is a student eligible for special education services under the classifications of Non-

Categorical Early Childhood ("NCEC") with a suspicion of autism and speech impairment ("SI"). [Respondent's Exhibit 1]

3. Petitioner received services from the ECI Program beginning in March, 2004, having qualified for such services in the area of communication/cognition. [Petitioner's Exhibit 27]

4. Petitioner experienced separation anxiety at night and school, and awoke once or twice at night at least 50% of time before his third birthday. [Petitioner's Exhibit 27; Respondent's Exhibit 1]

5. From June to December, 2004, on a full-day basis, Petitioner attended TLC Child Development Center ("TLC"), a private pre-school for typically-developing children. He required extra attention in art and extra direction when it was time to wash his hands. He spoke single words and some two to three word phrases. His speech skills were emerging and were steadily progressing. His greatest difficulty was successful communication in a classroom setting. He had separation anxiety when he began at TLC, but by December, 2004 he was not having difficulty with separation from his mother. Petitioner was in the process of being potty trained. The TLC staff had no problems with Petitioner's behavior, but encouraged him to interact with his peers since he kept to himself. [Tr. Vol. I, Pages 1, 2, 28-30, 34; Tr. Vol. II, Pages 101-103]

6. Prior to enrollment in the District, Petitioner received ECI services on a 1: 1 basis for 2 hours, 15 minutes per week. The weekly service consisted of 90 minutes speech therapy and 45 minutes occupational therapy for sensory regulation. [Tr. Vol. I, Page 25]

7. Numerous assessments of R. H. have been performed over a one year period. Those assessments

and results appear on Table I at the end of this decision.

8. At approximately age three, Petitioner could throw, catch and kick a ball, and work puzzles. [Petitioner's Exhibit 1; Respondent's Exhibit 1]

9. At almost four years, Petitioner could catch, throw and kick a ball, and jump up and down on both feet. [Petitioner's Exhibit 18]

10. On December 10, 2004, an admission, review and dismissal ("ARD") meeting was held at which time Petitioner was identified as a student eligible for special education services under IDEA with disabilities of NCEC with a suspicion of autism spectrum disorder and S1. The committee determined that R. H. needs one-to-one instruction during transition period, small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. The committee, including Petitioner's parent, developed an individualized education program ("IEP") for Petitioner that included 60 minutes of group speech therapy. The ARD committee did not require a Behavioral Intervention Plan ("BIP"), PT or OT. Petitioner was placed in the District's early childhood program at Beaty Early Childhood School ("Beaty") which is the home campus for a child of Petitioner's age. The ARD committee discussed and considered in-home training and parent training but determined that Petitioner would be able to generalize skills across settings; thus, neither training was offered. Petitioner's parent agreed with the ARD decisions. [Petitioner's Exhibit 2; Respondent's Exhibit 2; Tr. Vol. II, Pages 143-146, 161]

11. Numerous accommodations were determined necessary for Petitioner's educational success. A sampling of his short term objectives include the following:

- Answer yes/no questions
- Increase expressive vocabulary by 15 or more words per month
- Increase length of utterance to 3-5 words
- Engage in joint attention to non-preferred activities
- Develop tolerance to changes in environment by using visual/tangible cues
- Increase on-task behavior for non-preferred activities for 3-5 minutes
- Participate in classroom tactile activities for 1-2 minutes without protest
- Expand food varieties at snack to try 2 new foods per month [Petitioner's Exhibit 2; Respondent's Exhibit 2]

12. Beaty is one of three early childhood schools in the District and has an enrollment of over 400 students; it has a state-funded pre-kindergarten program for at-risk students, pre-school programs for children with disabilities ("PPCD") where students with disabilities attend with typically developing children who are tuition paid students; a communication program for students who only have IEP communication goals, Spanish special education classroom, self-contained classroom for students with more significant needs, a centralized structured classroom for students who need a high degree of structure and individual direct instruction among other early childhood programs. The three-year-old, PPCD classes at Beaty have a maximum enrollment of 12 students with an opportunity for six students

with IEPs and six tuition students per class; the four-year-old, PPCD classes have a maximum enrollment of 15 students, with an opportunity for six students with IEPs and nine tuition students per class. All teachers at Beaty are special education certified. Additionally, Beaty has Speech and Language Pathologists ("SLPs"), teaching assistants, OTs, and physical therapists ("PTs") on campus, along with itinerant support staff persons. The PPCD classrooms have one classroom teacher, one teaching assistant, and a SLP that comes on alternating days. [Tr. Vol. II, Pages 128-135; Petitioner's Exhibit 20]

13. The teacher to student ratio in Petitioner's class at TLC is approximately 2:26. Petitioner's teacher at TLC does not have a college degree and is not certified or licensed to teach in Texas public schools. There are no OTs or STs on staff at TLC and there is no occupational therapist that assists Petitioner during lunch at TLC. [Tr. Vol. II, Pages 100, 112-113, 120-123, 151]

14. Upon enrollment in the District, since no data existed regarding Petitioner's need for ESY, the ARD committee did not consider ESY. His teacher saw no indicators that Petitioner would regress during the summer months, and ESY was not offered to Petitioner for the summer, 2005. No ARD meeting was held to consider ESY for the summer, 2005. [Tr. Vol. II, Page161]

15. At Beaty, Petitioner, who was 3 years old at the time, demonstrated some aggression toward his teachers. After the use of picture supports and behavioral supports, the behaviors went away after one or two weeks. [Tr. Vol. II, Pages 251-252]

16. During Petitioner's enrollment at Beaty, Petitioner's parents observed that he cried often on

the way to school and after his mother picked him up at the end of the school day. He had difficulty making decisions and regularly woke up several times a week and was inconsolable. At a March parent teacher conference, Petitioner's parent discussed what she believed were increasing negative behaviors, lack of progress in speech, a need for intensive summer therapy, and other areas of concern. After receiving no response after the conference, the parents proceeded with private evaluations by Advanced Therapy Services ("ATS") to qualify Petitioner for services, and began private therapy in May, 2005 without giving notice to the District of their intent to privately place Petitioner. [Tr. Vol. I, Pages 44-48, 139]

17. Petitioner re-enrolled in TLC at the end of the spring semester, May, 2005. TLC had stopped its curriculum for the summer. Upon Petitioner's return, TLC experienced behavior problems and potty training issues with Petitioner. [Tr. Vol. II, Pages 104-107]

18. During the summer, 2005, R. H.'s parents provided him with private ST and OT. They discontinued the services in August while they worked with the District in the formulation of his IEPs. The parents noticed deterioration in Petitioner's language skills and some basic fine motor skills during that month and resumed ST. [Tr. Vol. I, Page 40-41]

19. Petitioner's parents contacted the Beaty principal affirming their belief that Petitioner needs a volume of typically-developing peers and a longer school day, and requested an ARD meeting. The District wanted to observe Petitioner at Beaty before the ARD meeting. In response, the parents notified the

District that they would not remove Petitioner from TLC until an agreement could be made regarding his IEP, and offered to allow the District to observe Petitioner at TLC. [Petitioner's Exhibits 4,5; Tr. Vol. I, Pages 54-58]

20. An ARD meeting was held August 15, 2005 and resumed Augusts 23 during which the parents presented the private evaluation results. Their requested changes were discussed. The District wanted to do its own OT evaluation, an articulation evaluation, a functional behavioral assessment, and an in-home training assessment within one month. [Tr. Vol. I, Page 68; Petitioner's Exhibit 12]

21. Petitioner has continued to attend TLC since the summer, 2005. He arrives between 9:00-9:30 a.m., and typically leaves at 5:30 p.m. [Tr. Vol. I, Page 58]

22. Petitioner has tactile defensiveness issues and it is difficult to get him to eat new foods independently in the school setting. Presently, Petitioner continues to refuse to eat at lunchtime at TLC. At home, he refuses to try prepared foods unless heavy prompts are used with him. Even with prompts, he often refuses. Petitioner's IEP includes goals to address those issues. [Tr. Vol. I, Page 37; Petitioner's Exhibit 2, 12, 14, and 22]

23. From August, 2005 to January, 2006, the District held several ARD meetings and many efforts were made to come to an agreement for Petitioner's IEP. [Petitioner's Exhibits 12, 14, 22, and 31]

24. The District refused Petitioner's request to increase his educational program to a full day, refused to place him at TLC at District expense, and refused to provide 90 minutes of individual ST and 30 minutes of group therapy. [Petitioner's Exhibit 32]

25. The District agreed to increase Petitioner educational program from 2 hours 45 minutes per day to 3 hours 45 minutes, adding time for lunch with peers and IEP goals for his eating issues. It offered 75 minutes of group ST and 15 minutes of individual ST. [Petitioner's Exhibit 32]

26. A 25 hour week of instruction for children with autism can be a combination of intensive classroom, intensive home, or intensive individual instruction. Individual instruction by a SLP is important because communication disorder is a hallmark characteristic of autism spectrum disorder; thus, the SLP should be in the classroom on a regular, daily basis for an extended period of time. [Tr. Vol. II, Pages 59-60]

27. Apraxia is a speech disorder that is difficult to diagnose and needs to be done over time in order to account for a child's language skills or a possible language disorder. Its characteristics can be seen in many other speech disorders. [Tr. Vol. III, Page 78-81]

28. Least restrictive environment at the pre-school age is within the context of meaningful daily activities with their typically developing peers in meaningful tasks such as play and reading stories. Children with autism often fail to generalize skills that are taught in a one on one setting. [Tr. Vol. III, Pages 96-97]

29. Dual enrollment was offered to Petitioner, but was not accessed. [Tr. Vol. II, Pages 225, 236]

30. At the parents' request, the mastery level of some of R. H.'s proposed objectives are higher than originally proposed. Although the proposed short term objectives for the 2005-2006 school year are not agreed upon, the following is a summary of those

objectives which incorporate Petitioner's parents requests:

- Correctly use pronouns at the sentence level
- Initiate greetings and closures in a variety of school settings at least two times per day
- Retell a familiar story in 5 consecutive session
- Indicate understanding of concepts in unstructured classroom activities to include: first, middle, last, next to, before and after
- Parent training to assist R. H. with developing a tolerance to changes in his environment, expand his food varieties to try and accept new food, and assist with learning to toilet independently
- Expand food varieties to try one new food per week and learn to accept without protest two new foods per month
- Attend to speaker by making visual regard before following instructions
- Actively play with at least 3 toys as designed for 10 minutes with only verbal prompts for 3 consecutive days
- Take preferred items from a peer, 2 per day without prompts for 3 consecutive days
- Participate in classroom tactile activities for 1-2 minutes without protest [Petitioner's Exhibit 31; Respondent's Exhibit 5]

Discussion

Was a resolution settlement agreement reached; if so, did the District breach the agreement?

If parties to a due process proceeding reach a resolution to the dispute, the IDEA 04 requires the parties to execute a legally binding agreement that is signed by both the parent and a District representative with authority to bind the District.

Such agreement can be voided by either party within three business days of the agreement's execution. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv). Although the parties in this matter participated in a resolution session, they did not sign a written settlement agreement. Petitioner failed to prove that a resolution settlement agreement was reached by the parties. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005). For the spring semester, 2005, did the District consider the full continuum of placement options, and was the placement for Petitioner appropriate?

The principal of Beaty was present at the December, 2004 ARD meeting and is knowledgeable of the continuum of placement options at the District. Although every type of classroom at Beaty were not specifically discussed, the committee discussed an appropriate option for R. H. in light of his educational needs for small group and one-on-one instruction and determined that the integration classroom was appropriate. Petitioner does not prevail on the issue regarding the District's failure to consider a continuum of placement options. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005). The appropriateness of Petitioner's placement will be discussed in the FAPE discussion below.

Was the District's placement of Petitioner in the spring semester, 2005, and its proposed placement for the 2005-2006 school year in the LRE; if not, did such placement result in a denial of FAPE to Petitioner?

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? Cypress Fairbanks Independent School District v. Michael F., 118 F.3d at 253.

Is the educational program individualized on the basis of the child's assessment and performance?

The District performed a FIE prior to Petitioner's third birthday. The evaluation results were the basis for Petitioner's IEPs that were developed in December, 2004. Speech therapy was recommended while occupational therapy was not although Petitioner's issues regarding tactile defensiveness during eating were addressed in his IEPs. The assessment team concluded that Petitioner did not need OT or PT because he had the necessary skills to

adequately perform in a classroom environment. During the only semester that Petitioner attended Beaty, although he had not mastered all of the IEP goals which were written for a year, he made overall progress on those goals by the end of the spring semester, 2005. Although Petitioner's parents contended that he suffered psychological side effects while at Beaty, Petitioner failed to prove that his problems were caused by his presence at Beaty.

In August, 2005, the ARD committee met at the parent's request to review Petitioner's IEP. A series of ARDs followed throughout the semester. The record reflects that the parents were active participants in the preparation of Petitioner's goals and objectives, and changes were incorporated as a result of such participation. Prior to a private physical therapy evaluation of Petitioner in the fall, 2005, there had been nothing to indicate a need for PT. The ARD committee reviewed the assessment and reports from R. H.'s TLC teacher and determined that PT was not necessary for Petitioner to adequately perform in a classroom environment.

There are two overarching issues that prevented an agreement regarding Petitioner's IEP: length of school day and individual speech therapy. Petitioner's parents do not disagree with the benefits for group speech therapy, but believe R. H. should have more individual sessions. The parents want Petitioner to have individual ST in an amount of 30 minutes, three times per week. The District proposed 15 minutes of one-to-one ST and group ST for 75 minutes per week, an increase from 60 minutes group therapy that was provided in the 2005 spring

semester. The record reflects that R. H. mastered some speech skills and progressed on all skills with the 60 minute group therapy that he received in the 2005 spring semester.

Petitioner's parents want an extended school day to total 25 hours per week. While a 25 hour per week program may be the general recommendation, the District's obligation under the IDEA 04 is to create an education program based on Petitioner's individual and unique needs. The District offered to increase Petitioner's school day from 13.75 to 18.75 hours per week to include lunchtime during which he would be with peers and his eating issues could be addressed by district personnel with the guidance of an OT. While there was expert testimony in support of both positions, I find that Petitioner's spring semester, 2005 IEP and the proposed educational program for 2005-2006 are individualized on the basis of his assessment and performance.

Is the program administered in the LRE? The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S. C. § 1412 (a)(5). Although a school is not required to try every conceivable supplementary aid or service, it should mak. more than a token effort. If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school

must mainstream the child to the maximum extent appropriate. Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).

In this case, there are no "regular" classrooms for three and four year old students. Compulsory school age in the state of Texas is six years. Tex. Educ. Code § 28.085(b). However, the District offers a variety of classes for three and four year old students, some of which are entirely for typically developing students; these classes are for students who are limited-English, Spanish speaking, or students whose only IEP goals and objectives are in the area of communication. The PPCD classrooms are made up of both children with disabilities and typically developing children, the ratio of which may be fluid and vary from approximately 1/3 students with IEPs, and 2/3 typically developing students to a more even ratio of ½ students with IEPs and ½ typically developing students.

Although Petitioner believes that a larger number of typically developing peers is more desirable such as the student make-up of TLC, other factors should be considered. Petitioner's expert witness, Dr. Felini-Smith, testified that the District's PPCD program strives to have an even mix of students and to provide an array of developmentally appropriate activities and keep the class size relatively small compared to many pre-school settings. She acknowledged that the teachers at Beaty are special educators knowledgeable of strategies for working with autistic students such as Petitioner. Her reservations with the program were the regression that was reported to her and the length of the school

day. District personnel did not see regression in Petitioner; in fact, the progress notes in his IEPs and witness testimony at hearing support that he was making progress.

Petitioner wants to continue at TLC at District expense and argues that TLC is the least restrictive environment. However, Petitioner's teacher at TLC is not a certified special educator, the student to teacher ratio is high, and no SLP is on staff. ARD documents reflect that Petitioner's parents do not believe that the teachers at TLC are trained to recognize sensory issues that affect his participation at lunch. In light of the fact that Petitioner requires an individualized education program to address his speech and communication needs and his tactile defensiveness issues, and his need for small group and one to one instruction, the Beaty PPCD program is the least restrictive environment for Petitioner.

Are services provided in a coordinated and collaborative manner by the key stakeholders: At Beaty, there is a SLP in the classroom on alternating days. During the spring semester, 2005, Petitioner's classroom teacher and the SLP worked closely together. An occupational therapist is on staff to assist with strategies for Petitioner's eating issues which can be addressed during lunchtime with his peers. In the lengthy ARD meetings that began in August, 2005, R. H.'s parents took an active part in the development and revision of his IEP. In contrast, the record reflects that there is no collaboration between the TLC teacher and the key stakeholders. The teacher testified that she did not interact with the private service providers. Services are provided

at Beaty in a coordinated and collaborative manner by the key stakeholders.

Are positive academic and non-academic benefits demonstrated? The record reflects that Petitioner benefited from his one semester at Beaty. His parent admitted to improvement in March, 2005. During the August, 2005 ARD meeting, his parent agreed that he was making progress within the school day. At the January 11, 2006 ARD meeting his mother said she believed he made *more* progress in a one to one setting. She did not say he made no progress in a group setting such as the District recommends. Commendably, Petitioner's parents want him to make maximum progress and seem to feel a sense of urgency regarding his needs. However, maximum progress is not the test. The educational benefit that an IEP is designed to achieve must be meaningful and likely to produce progress, rather than regression or trivial educational advancement. Although the educational benefit must be meaningful, schools are not required to maximize a child's potential or provide the best program. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998). Petitioner's overall progress at Beaty was meaningful.

Did the District fail to consider or provide ESY to Petitioner during the summer, 2005?
At the time Petitioner enrolled in the District in January, 2005, there was no data available to use to determine a need for ESY. The District relies on the teachers' observations of regression after breaks from school. In Petitioner's case, those breaks consisted of

weekends and spring break. His teachers did not see any regression following those breaks. However, on March 22, 2005, Petitioner's parent met with his teacher and gave her a list of her concerns which stated, "Due to the critical, limited window of opportunity for intervention benefits for autism spectrum disorders, intensive summer therapy is a must." A copy of the document was given to Petitioner's teacher to pass on to the building principal. Although the record reflects that Petitioner's teacher believed that she and the parent had resolved that concern, Petitioner's parent did not consider it resolved. No ARD meeting was held. When Petitioner's parent did not hear from the District, in April, 2005, she proceeded to obtain new evaluations of Petitioner and to seek a summer program for Petitioner. Petitioner enrolled at TLC and his parents provided him with OT services and 20 individual ST sessions of 90 minutes per week from May, 2005 to August, 2005.

Having been made aware of the parent's concerns at the mid-point of Petitioner's first semester in the District, and in light of summer's approach, it is reasonable to expect the District to respond by scheduling an ARD meeting at which time the necessary decision makers could consider the need for ESY.

The IDEA 04 requires a district to provided ESY if a *child's IEP team* determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 20 U.S.C. 1412 (a)(1) [emphasis added]. The Texas Education Agency has specified criteria for determining when ESY must be provided.

The ARD committee must make the determination regarding a need for ESY. Documentation must demonstrate that in one or more critical areas addressed in the student's current IEP objectives, the student reasonably may be expected to exhibit severe or substantial regression that cannot be recouped within a reasonable period of time. 19 Tex. Admin. Code §89.1065[emphasis added]. The District failed to consider ESY to Petitioner during the summer, 2005 and, in so doing, denied FAPE to Petitioner.

Compensatory education is an equitable remedy available for substantive or procedural IDEA violation. Burlington Sch. Comm. V. Department of Educ., 471 U.S. 359 (1985); Alamo Heights Indep. School Dist. V. State Bd. Of Educ., 790 F.2d 1153 (5th Cir. 1986). In fashioning appropriate equitable relief, consideration is given to the conduct of the parties along with the nature of relief requested. Parents of Student W. v. Puyallup School District, No.3, 21 IDELR 723 (9th Cir. 1994). Due to the parents' concern regarding a limited window of opportunity to develop speech and language skills and their conviction that R. H. needs occupational therapy, either speech therapy, occupational therapy, or both services would be appropriate compensatory services.

Petitioner's Request for Reimbursement

Regarding Petitioner's request for reimbursement for the 2005 summer program, he cannot prevail since he did not comply with the IDEA 04 notice requirement prior to his unilateral enrollment at TLC. 20 U.S.C. § 1412(a)(1O)(C)(iii). Petitioner also requests reimbursement for costs incurred from the

fall, 2005 through the present about which he provided notice to the District, along with his costs for privately obtained evaluations. To receive reimbursement, Petitioner must discharge two burdens of proof. First, he must show that Respondent's proposed 2005-2006 program was inappropriate. Second, he must show that the TLC program is appropriate. If Petitioner fails to discharge either burden, he is not entitled to reimbursement. However, if the Hearing Officer finds that the District's proposed program is appropriate, it is not necessary to reach the issue of the appropriateness of the private school placement. School Committee of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 365 (1993); Tatro v. State of Texas, 703 F.2d 823, aff'd, 468 U.S. 883 (1984). Having previously determined that Respondent's program is appropriate, nothing further must be determined regarding reimbursement for costs.

Conclusions of Law

1. R H. is a child in the Plano Independent School District who is eligible for special education services under the provisions of the IDEA 04 as a child with autism and speech impairment.

2. Respondent, Plano Independent School District, is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA 04. Plano Independent School District is RH.' s resident district and has the responsibility to provide Petitioner with a free appropriate-public education under the IDEA O 20 U.S.C. §1401(a)(18).

3. Petitioner and Respondent did not reach a resolution settlement agreement. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. S28 (2005).

4. For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petitioner for the spring semester, 2005, was appropriate. Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

5. The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE. 20 U.S.C. §1412(a)(I) and (5); Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

6. The District failed to consider or provide ESY to Petitioner during the summer, 2005; such failure was denial of FAPE. 20 U.S.C. 1412 (a)(1);19 Tex. Admin. Code §89.1065.

Order

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, Respondent is ordered to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and

2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs.

All other relief not specifically granted is hereby DENIED.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of **Special Education Programs and Complaints** at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED on the 30th day of May, 2006.

_____

Brenda Rudd
Special Education
Hearing Officer
For the State of
Texas

R.H. b/n/f M.H. and E.H. v. Plano Independent
School District
Docket No. 108-SE-0106
Amended Decision of Hearing Officer

TABLE 1

Evaluation Date	**Age of Petitioner**	**Evaluation Performed**	**Results**
11.15.04	2yrs. 9mos.	Full Individual Evaluation (FIE) by District	a. Brief IQ 105 Evaluation (FIE) b. Behaviors that impede adequate development of interpersonal skills c. Difficulty with flexible thinking d. Transition difficulties e. CARS score 30 w/I range of Autism Spectrum Disorders f. No difficulties that would prevent progress on goals; no need for OT g. Significant disruptions in ability to communicate and use language; uses jargon, word approximations a few single words and occasional 2-3 word phrase h. Does not interact with peers and has difficulty attending to large group instruction

			i. Can adequately bite, chew and swallow but has limited diet [Petitioner's Exhibit 1; Respondent's Exhibit 1]
4.12.05	3 yrs. 2 mos. Approx.	Speech Assessment by Advanced Therapy Services (ATS) at request of parents	a. Mild expressive language delay and moderate receptive language delay; age equivalent 2 yrs. 8 mos. b. Oral aversion [Petitioner's Exhibit 28]
4.28.05	3 yrs. 2 mos. Approx	Occupational Therapy (OT) Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor and fine motor skills. Petitioner's result: grasping age equivalent 14 months; visual-motor integration age equivalent 35 months b. Definite differences with vestibular processing and oral processing; definite difference in sensory input affecting emotional response; probable difference with emotional/social responses and behavioral outcomes of

			sensory processing c. Problem areas: decreased fine motor skills, visual-motor integration, sensory processing and self-care skills. d. Currently being potty trained [Petitioner's Exhibit 28]
9.15.05	3 yrs. 8 mos. Approx	Physical Therapy Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor, fine motor skills; Petitioner rated 33 mos.-Stationary, 34 mos.-Locomotion, and 30 mos.- Object manipulation[Petitioner's Exhibit 28]
9.14.05	3 yrs. 8 mos. Approx	Addendum to FIE by District (articulation)	a. Goldman-Fristoe Test-difference in percentage consonant correct in single words and connected speech 8%; does not qualify for articulation therapy [Petitioner's Exhibit 13, Respondent's Exhibit (articulation) 8]
9.16.05	3 yrs. 8 mos. Appr	FIE-OT by District	a. No difficulty with fine motor, gross motor, self-help, or sensory processing skills that

	ox		impaired functioning in classroom b. Parents reported Petitioner is displaying tactile defensiveness to some grooming and health procedures in home setting, such difficulties do not appear to affect his ability to perform in the classroom. No occupational therapy needed to support goals and objectives in IEP. [Petitioner's Exhibit 13, Respondent's Exhibit 9)
9.3.05	3 yrs. 8 mos. Approx	FIE-Related Service of In-Home and Parent Training by District	a. Parents concerned with Petitioner's lack of self-initiated use of toilet, fixation on his written name, limited diet, tactile defensiveness to things such as tags and long sleeves on clothing, and tantrums when told no b. Parents invited to participate in meetings on topic of social skills, behavior, and potty

			training for a total of 7.5 hours. c. Related service of parent training recommended as individualized session of 3 hours by a district home trainer to help parents implement strategies learned in parent training and support meetings. [Petitioner's Exhibit 13]
9.16.05	3 yrs. 8 mos. Approx	Addendum to FIE-Behavioral assessment by District	a. Private and District preschool staff reported positive behaviors in school setting with some difficulty managing transitions from preferred to non-preferred tasks and playing appropriately with peers. b. Parents report more difficult behaviors in home setting regarding trying new foods, self-regulatory sensory and emotional needs, and adapting to routine changes. c. Petitioner's behavior consistently rated across setting within

			average range compared to his same age peers [Petitioner's Exhibit 13, Respondent's Exhibit 10]
12.1.05 report date	3 yrs. 9 mos. Approx. at evaluation	Individual Educational Evaluation by Linda Felini-Smith, PhD at request of parents	a. Full scale IQ-127;superior range of cognitive functioning compared to age mates b. PEP-R test for children with autism. Petitioner's performance was commensurate with his above average cognitive ability c. CELF-P test for language comprehension and expression tasks: below average d. Average range for single word vocabulary, comprehension of single words; articulation was good e. Phrases and sentences were intelligible, but when intelligibility decreased, it was sometimes due to jargon which appeared to be triggered by overwhelming

			language demands f. Vineland assessment of adaptive (day to day) functioning: within average range with the exception of daily living skills g. Summary: Petitioner has language and social deficits associated with autism disorder; nonverbal cognitive skills in superior range compared to same age peers; moderate communication disorder characterized by deficits in processing and production of language and pragmatics, or interactive use of language; evidences mild-moderate developmental apraxia of speech [Respondent's Exhibit 19]

DOCKET NO. 108-SE-0106

R. H.	§	BEFORE A SPECIAL
b/n/f *M.* H. & E.H.	§	EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	FOR THE
PLANO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	ST ATE OF TEXAS
	§	

SYNOPSIS

Issue: Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement.

Held: For Respondent

Citation: 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

Issue: For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate.

Held: For Respondent

Citation:	Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).
Issue:	Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of F APE to Petitioner.
Held:	For Respondent
Citation:	20 U.S.C. §1412(a)(1) and (5); Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)
Issue:	Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.
Held:	For Petitioner
Citation:	20 U.S.C. 1412 (a)(1); 19 Tex. Admin. Code §89.1065

APPENDIX B – REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND ASSOCIATED ADOPTING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS ORDERED MARCH 31, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

R.H., BY HIS PARENTS AND NEXT FRIENDS, EMILY AND MATTHEW H.	§	
Plaintiff,	§	CASE NO. 4:06cv352
v.	§	
PLANO INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Now before the Court are Defendant's Motion for Summary Judgment on the Administrative Record (Dkt. 15) and Plaintiff's Motion for Summary Judgment on the Administrative Record (Dkt. 38). Having reviewed the motions, responses, and the administrative record before it, the Court finds Defendant's Motion should be GRANTED, Plaintiff's Motion should be DENIED, and the findings of the Special Education Hearing Officer for the State of Texas in this matter should be affirmed.

BACKGROUND

Plaintiff, R.H., a four-year-old boy with a disability, has filed this civil action against Defendant Plano Independent School District ("PISD"), alleging violations of the Individuals with Disabilities Education Act. Specifically, Plaintiff alleges that Defendant has violated his rights under IDEA to be educated with his non-disabled peers to the maximum extent appropriate and to be educated in the least restrictive environment, in violation of his right to a free appropriate public education.

On January 25, 2006, Plaintiff requested a due process hearing from the Texas Education Agency, in accordance with IDEA, complaining of Defendant's actions. Following the due process hearing on April 4, 6, and 7, 2006, the Special Hearing Officer issued a decision in favor of Defendant. The Special Hearing Officer made the following conclusions of law relevant to R.H.'s case here:

- For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petition for the spring semester, 2005, was appropriate.
- The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE.
- The District failed to provide ESY to Petitioner during the summer, 2005 (A.R. I at 14).

Based on these findings and the record before her, the Special Hearing Officer ordered PISD to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and

2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs. (A.R. I at 15).

Plaintiff now brings this civil action pursuant to 20 U.S.C. §1415(i)(2)(A) alleging that the hearing officer failed to properly interpret federal law and that her findings are not supported by the record. Plaintiff claims that PISD's placement of R.H. at Peaty Early Childhood School, a district preschool where both disabled and non-disabled children are enrolled, violated the IDEA. Plaintiff further argues that the appropriate placement for R.H. is at TLC, a private preschool which R.H. has attended and for which Plaintiff seeks reimbursement here.

STANDARD

This case arises under the IDEA, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482. The IDEA's purpose is "to ensure that all

children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

States receiving federal assistance under the IDEA must: (1) provide a "free appropriate public education" ("FAPE") to each disabled child within its boundaries, and (2) ensure that such education is in the "least restrictive environment" ("LRE") possible. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir.1997); 20 U.S.C. § 1412(1), (5). The FAPE provided must be developed to each disabled child's needs through an "individual educational program" ("IEP"), which is a written statement prepared at a meeting attended by a school district representative, a teacher, the child's parents or guardians, and, when appropriate, the child. *Michael F.*, 118 F.3d at 247; *see* 20 U.S.C. § 1414(d). In Texas, the committee responsible for preparing an IEP is known as an Admissions, Review, and Dismissal Committee ("ARD Committee").

The role of the judiciary under the IDEA is limited, leaving the choice of educational policies and methods in the hands of state and local school officials. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003), *citing Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996). The Court must reach an independent decision based on a preponderance of the evidence. *Houston Indep. Sch. Dist. v. Bobby R.*,

200 F.3d 341, 347 (5th Cir. 2000); *Cypress- Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). However, this requirement "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed.2d 690 (1982). Instead, "due weight" is to be given to the hearing officer's decision. *Id.* Thus, "courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. The Court's task therefore is not to second guess PISD's decisions or impose its own plans for the education of disabled students; rather, it is the narrow one of determining whether PISD complied with the IDEA. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *see also Daniel R.R. v. State Bd. of Edu.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

The party seeking relief under the IDEA – Plaintiff here – bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005). Specifically, "a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the

IDEA." *Michael F.*, 118 F.3d at 252. The IDEA also creates a presumption in favor of the education plan proposed by the school district, and places the burden of proof on the party challenging it. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Edu.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

Here, the parties concur that the is no need for additional evidence or discovery to be conducted in this proceeding. Therefore, the Court will determine the merits of the case based on the administrative record. *Austin Indep. Sch. Dist. v. Robert M.*, 168 F. Supp.2d 635, 638 (W.D. Tex. 2001), *aff'd*, 54 Fed. Appx. 413 (5th Cir. 2002); *see also Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994), *cert. denied*, 513 U.S. 839, 115 S. Ct. 123 (1994).

Both parties have filed summary judgment motions and responses framing their positions in light of the administrative record before the Court. Notably, many of the facts alleged by Plaintiff in his summary judgment pleadings do not refer to specific portions of the administrative record. The Court notes that, in summary judgment proceedings, the parties are expected to cite to specific facts in the record. *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). The citations to evidence must be specific, as the district court is not required to "scour the record" to determine whether the evidence raises a genuine issue of material fact. E.D. TEX. LOCAL R. CV-56(d); *see also Ragas v.*

Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998) (Rule 56 does not require court to rifle through the record in search of evidence to support a party's opposition to summary judgment). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). The Court has therefore based its analysis primarily on those portions of the record specifically cited by the parties.

ANALYSIS

In this case, Plaintiff seeks reimbursement for the cost of the minor's schooling at TLC, a private school his parents enrolled him in. For parents of a disabled child to be entitled to reimbursement for private schooling, they must show both that (1) the public placement violated the IDEA and that (2) the private school placement was proper under IDEA. *Florence County School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361, 365 (1993); *Town of Burlington v. Dep't. of Edu.*, 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003 (1985). If reimbursement is appropriate, it can be retroactive from the time of placement in the private school. *Id.*

Thus, the Court will first look to whether PISD's placement of Plaintiff at Beaty Early Childhood School, a school within the District, violated the IDEA. If the Court finds that it did not, then it need not reach an analysis of the propriety of the private school placement at TLC.

Under the IDEA, public school districts in states receiving federal funds must provide each child with a FAPE. 20 U.S.C. § 1412(a)(1). To establish that PISD failed to provide R.H. with a FAPE, Plaintiff must first demonstrate that: (i) PISD failed to comply with the procedures set forth in IDEA; or (ii) the individualized education program (IEP) developed by PISD through the IDEA's procedures was not reasonably calculated to enable R.H. to receive educational benefits. *Bd. of Edu. v. Rowley*, 458 U.S. 176, 207-08, 102 S. Ct. 3034, 3051 (1982). Because Plaintiff alleges no procedural violations of the IDEA here, the Court focuses on whether PISD developed an IEP for R.H. that was reasonably calculated to enable him to receive educational benefits.

In determining whether an IEP is appropriate, the Fifth Circuit has outlined four factors to consider: (1) whether the program is individualized on the basis of the student's assessment and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) whether positive academic and non-academic benefits are demonstrated. *Michael F.*, 118 F.3d at 253.

In other words, an IEP must be geared to provide "meaningful" educational benefit. *Rowley*, 458 U.S. at 192; *see also Michael F.*, 118 F.3d at 248. The inquiry does not turn, however, upon whether the District provided R.H. with an education designed to maximize his potential. *Michael F.*, 118 F.3d at 247-48. As the IDEA guarantees a "basic floor or

opportunity," the District is only bound to provide "access to specialized instruction and related services which are individually designed to provide educational benefit." *Rowley*, 458 U.S. at 201. "Nevertheless, the educational benefit to which the [IDEA] refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.'" *Michael F.*, 118 F.3d at 248 (footnotes omitted) (quoting *Bd. of Educ. of the E. Windsor Reg'l Sch. Dist. v. Diamond*, 808 F.2d 987, 991 (3d Cir.1986)).

Thus, the Court will examine the administrative record under the four *Michael F.* factors listed above to determine whether R.H.'s IEP was appropriate.[1]

1. Individualized IEP Based on Student's Assessment and Performance

The Court finds, by a preponderance of the evidence before it, that the IEP developed for R.H. was individualized for his needs. He was evaluated, observed, and assessed by PISD and a team of professionals, including a psychologist, speech therapist, an occupational therapist, and an

---

[1] The Court notes that Defendant has argued that Plaintiff has waived any challenge to the conclusions as to some of these factors under 20 U.S.C. § 1415(i)(1)(A), but has provided argument on them nonetheless. Because the record is not wholly clear as to which portions of the Special Hearing Officer's findings Plaintiff has challenged, to ensure a full and fair analysis as to the ultimate conclusion that R.H.'s IEP was appropriate, the Court has evaluated the record under all four factors.

education specialist (A.R. III at 678-741; 748-787). Additionally, PISD gathered information from R.H.'s parents and teachers at TLC to formulate an appropriate plan for him. R.H.'s IEP was based on this assessment which, in light of the record here, appears to have been thorough and individualized. Indeed, the record contains hundreds of pages evidencing such evaluations and assessments. *(See, e.g.*, A.R. II at 210-347, III at 678-873).

Throughout the record there is evidence of meetings between parents and school officials, ARD committee meetings, and District meetings, regarding the plan for R.H. The formulation of R.H.'s IEP was a clearly constant and evolving process. In addition to various classroom accommodations, R.H.'s IEP indicated that he needed to be in an environment with a low student to staff ratio and that he needed direct one-on-one instruction while transitioning between activities (A.R. III at 697, 711; A.R. IV, Hearing Transcript II 144, 161). Further, it appears that, as R.H.'s parents raised any concerns about his progress, PISD would conduct additional evaluations and would consider any additional evaluations submitted by R.H.'s parents. Other than the District's failure to provide summer schooling for 2005 (which the special hearing officer held did not comply with IDEA and which will be addressed later in this report), there is nothing in the record to indicate the PISD failed to respond to R.H.'s individualized progress or needs with some sort of conference with school officials and parents and a corresponding revision to his IEP.

R.H's parents specifically contest those portions of the IEP regarding the proposed length of school day and the amount of individualized speech therapy. While his parents believe he needed more individualized speech therapy rather than the 15 minute sessions, coupled with 75 minutes group sessions recommended by the District, the record indicates that R.H. made some progress in his speech skills with even 60 minutes group therapy. Therefore, the Court does not find, under a preponderance of the evidence, that the District's recommendation regarding speech therapy was insufficient for R.H.'s specific needs.

In regards to the length of the school day, after R.H.'s parents expressed concern, the District specifically proposed to extend the length of each school day to include lunch time so that R.H.'s eating, textural, and feeding issues could be addressed by District personnel and therapists. Plaintiff has not shown how the District's refusal to lengthen the school day more resulted in a failure to address any other individualized needs. As noted above, to be in compliance with the IDEA, a school district is not required to provide an education that maximizes a student's potential. Therefore, by a preponderance of the evidence before it, the Court agrees with the Special Hearing Officer and finds that the 2005 IEP and the proposed educational program for 2005-2006 school year were individualized to R.H.'s needs in light of his assessment and performance.

2. Services Provided in Coordinated and Collaborative Manner by Key "Stakeholders"

As with the individualized IEP, the record indicates extensive participation in R.H.'s educational plan by various professionals within the District (A.R. III at 678-693). The District relied upon teachers certified in special education, speech pathologists, occupational therapists, and school psychologists, among others, to evaluate R.H.'s needs. Additionally, R.H.'s parents were active in the development of his IEP. There is nothing in the record to indicate that his well-being was not the primary objective of both the District and his parents or that the key stakeholders did not work together in developing a plan. Moreover, the record reflects an educational plan for R.H. that incorporated the input and collaboration on all of these individuals, including periodic reports to and conferences with R.H.'s parents regarding his progress. Therefore, the Court finds by a preponderance of the evidence, as did the Special Hearing Officer, that R.H.'s IEP was developed and implemented in a coordinated and collaborative manner by the key stakeholders.

3. Demonstration of Positive Academic and Non-academic Benefits

Unfortunately, R.H. attended Beaty for only one semester, so the time period that the Court has to evaluate his progress is rather short. And, the Court agrees with the District that the true extent of how much R.H. would benefit from the IEP is hampered by the fact that he did not stay enrolled at Beaty for

the full 12-month period the IEP was developed for. However, the record sufficiently indicates that R.H. made some progress during that short period (A.R. III at 693-94, 700, 720-721; A.R. IV, Hearing Transcript II, at 255-262; A.R. IV, Hearing Transcript III, at 16-24). The possibility that he did not make as much progress as his parents would hope, while certainly unfortunate, does not mean he did not demonstrate some positive benefits from the IEP, sufficient to show the District formulated an appropriate IEP for his needs. Having weighed the record before it, the Court finds this element was satisfied.

4. Program Administered in Least Restrictive Environment

Whether PISD's program was administered in the least restrictive environment, or LRE, appears to be the gravamen of Plaintiff's complaint here. The IDEA requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). Plaintiff argues that the decision of the Special Hearing Officer failed to comply with this provision and Fifth Circuit precedent. In *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989), the Fifth

Circuit developed a two-part test to determine whether Section 1412 has been complied with:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. *See id.* A variety of factors will inform each stage of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

Daniel R.R., 874 F.2d at 1048. Plaintiff argues that the District did not comply with this requirement. The Court disagrees.

Plaintiff claims that placement at Beaty was not in the LRE because R.H. would have been exposed to a greater number of non-disabled peers if he attended TLC. The least restrictive environment has been defined by the Fifth Circuit as "not only freedom

from restraint, but the freedom of the child to associate with his or her family and able-bodied peers to the maximum extent possible." *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 128 n.2 (5th Cir.1993) (emphasis added) (citations omitted). Plaintiff claims that "[a]lthough the least restrictive classroom option on the Beaty campus was recommended, this 'integrated' placement provided R.H. with greatly reduced exposure to his non-disabled peers compared to his regular education setting at TLC." Dkt. 38 at 4. Plaintiff cites to evidence in the record that the enrollment of students at Beaty fluctuated, such that, during some periods, only half of the students in any given class might be non-disabled. Plaintiff claims that TLC, on the other hand, had a significantly smaller percentage of disabled children in R.H.'s class.

However, the fact (or possibility as it appears in this case) that R.H. may have been in a classroom with a greater percentage of non-disabled peers at TLC does not mean that the Beaty classroom environment is not considered an LRE. Importantly, the Fifth Circuit has stated that "even when school officials can mainstream the child, they need no provide for an exclusively mainstreamed environment; the Act requires school officials to mainstream each child only to the maximum extent appropriate." *Daniel R.R.*, 874 F. 2d at 1045. Here, R.H. was placed in an integrated environment at Beaty where he was in a classroom with both disabled and non-disabled peers. Plaintiff has not shown that this integrated classroom – merely because it contained more disabled children than his at TLC – failed to provide him with a FAPE, and there is no magic number of

non-disabled peers a classroom must have in order to satisfy the IDEA. The Court agrees that the integrated classroom offered at Beaty was mainstreamed to the maximum extent appropriate.

The Court next addresses Plaintiff's allegation that PISD's failed to consider TLC as a possible LRE for R.H., including the District's purported failure to consider whether placement at TLC with supplemental aids would have been more appropriate. Plaintiff relies on some testimony by Beaty's principal that she did not consider TLC when determining the LRE for R.H. The Court need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE. Even though a private school might be more appropriate or better able to serve a child, courts have found that school districts are not required to consider private placement as long as an appropriate public school program is available. *See, e.g., Michael F.*, 931 F. Supp. at 479. As correctly noted by one court,:

> [T]he proposition that a school district is required, as part of its assessment of how best to provide for a child's education, to canvass private schools for possible placements if so requested by the parents....is a faulty reading of IDEA. The law requires the district to evaluate the child's needs and to determine what is necessary to afford the child a FAPE. If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it

> place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if [the District], having identified the services needed by the child, concludes that those services can be provided in the public school.

W.S. ex rel. C.S. v. Rye City School Dist., 454 F. Supp.2d 134, 148 (S.D. N.Y. 2006).

It seems that Plaintiff's argument is premised on the assumption that TLC is a "regular" classroom and Beaty is not. The Court finds that the neither the record nor applicable case law make such a bright line distinction. The classrooms in both schools had both disabled and non-disabled children in them – though the ratio of disabled to non-disabled may have differed. The Court finds that, however way Beaty is characterized, the District's plan provided R.H. with supplemental aids and services — one of which may have well indeed been the placement of R.H. in a classroom with both disabled and non-disabled peers where he could both model appropriate behaviors and receive the extra services, attention, and therapies from trained care providers his disability merited — in the least restrictive manner. As recognized by the court in *Daniel R.R.*, a variety of factors determine whether a District has appropriately mainstreamed a child with disabilities. *Daniel R.R.*, 874 F.2d at 1048. The Court finds that

the placement at Beaty constituted a program administered in the least restrictive environment as required by the IDEA and the cases interpreting it.

Having examined this case under all four of the *Michael F.* factors, the Court, therefore concludes by a preponderance of the evidence that the record indicates that PISD's IEP for R.H. was reasonably calculated to enable him to receive meaningful educational benefits and thus provided him with a FAPE in accordance with IDEA. As noted above, because the Court has concluded that PISD did not violate IDEA in this case, the Court need not reach whether TLC was an appropriate private school placement.

Because the Court agrees that PISD complied with IDEA, Plaintiff is not entitled to reimbursement for the costs of TLC during the 2005-2006 school years. Although 20 U.S.C. § 1415(e)(3)(A) provides that "during the pendency of any proceedings conducted pursuant to this section, ... the child shall remain in the then current educational placement of such child," "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3)" *School Committee v. Department of Educ.*, 471 U.S. 359, 373-74, 105 S.Ct. 1996, 85 L. Ed.2d 385 (1985). Because PISD did not consent to R.H.'s transfer to

private school, his parents are not entitled to reimbursement for the cost of TLC for the 2005-2006 school year. *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000).

Notice Requirement for Summer 2005

In his complaint, Plaintiff alleges that the Special Hearing Officer erred as a matter of law by applying the IDEA notice requirement to bar reimbursement to Plaintiff for summer 2005. Plaintiff argues that the notice requirement applies only to a case in which a parent specifically refuses placement and that no placement was offered for Summer 2005 in this case. 20 U.S.C. § 1412(a)(10)(C)(iii).

As noted above, the Special Hearing Officer concluded that the District failed to provide R.H. with a FAPE for the Summer of 2005 because it failed to consider providing him with ESY during that period. It is undisputed that R.H.'s parents enrolled him in TLC for that period. When parents enroll their children in private schools without the consent of the school district, "a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. § 1412(a)(10)(c)(ii).

Here, the Special Hearing Officer determined reimbursement was not warranted because Plaintiff did not comply with the notice requirements outlined in 20 U.S.C. § 1412(a)(10)(c)(iii) (A.R. at 14). Plaintiff

argues that these notice provisions did not apply to the denial of the 2005 summer session because no ARD meeting was ever conducted to specifically consider this session. However, Plaintiff does not cite any to legal authority or portions of the record to support his apparent argument that the denial of the 2005 summer session was not encompassed by the other ARD meetings and therefore not subject to the notice requirements. Therefore, the Court declines to find that the Special Hearing Officer erred in her findings regarding the notice requirements. In any event, the Court notes that regardless of the notice requirement, the reimbursement of costs under this section of the IDEA is within the Special Hearing Officer's discretion. 20 U.S.C. § 1412(a)(10)(c)(ii). The Court declines to find that the Special Hearing Officer abused her discretion in finding Plaintiff was not entitled to reimbursement here.

Attorney's Fees

Plaintiff seeks an award of attorney's fees here. Under the IDEA, a court may, in its discretion award attorney's fees to a parent of a child with a disability if that parent is found to be the prevailing party. 20 U.S.C. § 1415(i)(3)(B)(i)(I). The Court declines to find that such an award of attorney's fees is justified here because Plaintiff has not prevailed.

Costs

Finally, PISD seeks to recover its taxable costs of court under *Michael F.*, 118 F.3d at 256- 57. The Court declines to award costs to PISD under *Michael F.* While the Fifth Circuit did not expressly

disapprove of the district court's award of costs in that case, the court suggests that such an award was within the district court's discretion. Indeed, costs are recoverable under Rule 54 unless a "court order provides otherwise." FED .R. CIV. P. 54(d) The taxing of costs under 20 U.S.C. § 1920 is likewise discretionary. Further, the *Michael F.* court stated it did not disagree with the parents' equity-based arguments in opposing an award of costs. *Michael F.*, 118 F.3d at 257. Plaintiff makes similar arguments here.

The Court agrees with Plaintiff that the spirit, if not the express language, of the IDEA does not contemplate such an award of costs in favor of a prevailing school district. And, based on these facts, the Court declines to award the school district its costs.

Although the Court ultimately found in favor of the school district, R.H.'s parents here were well within their rights under the IDEA and their obligations as parents to ensure that their son is afforded all the opportunities available to him. R.H.'s parents were only seeking the best for their son. The Court finds that, absent clear authority mandating them to do so, they should not be required to take on additional financial burdens solely because they sought adjudication of this matter.

Recommendation

Based on the foregoing, the Court recommends that Defendant's Motion for Summary Judgment on the Administrative Record (Dkt. 15) be GRANTED, that

Plaintiff's Motion for Summary Judgment on the Administrative Record (Dkt. 38) be DENIED, that the findings of the Special Education Hearing Officer for the State of Texas in this matter be affirmed, and that each party should be ordered to bear its own costs and fees.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(c).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 7th day of March, 2008.

/s/ Don. D. Bush
Don D. Bush
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

R.H.. BY HIS PARENTS AND NEXT FRIENDS, EMILY AND MATTHEW H.	§	
Plaintiff,	§	CASE NO. 4:06cv352
v.	§	
PLANO INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Memorandum Adopting Report and Recommendation of United States Magistrate Judge filed in this matter, it is hereby

CONSIDERED, ORDERED, AND ADJUDGED that the final decision of the Special Education Hearing Officer is hereby **AFFIRMED** and judgment is **GRANTED** in favor of Defendant.

Each party shall bear its own costs, and all motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this the 31st day of March, 2008.

/s/ Richard A. Schell
Richard A. Schell
United States District Judge

APPENDIX C – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED MAY 27, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals Fifth Circuit
FILED
May 27, 2010
Lyle W. Cayce
Clerk

No. 09-40369

R.H., Unidentified Party, by His Parents and Next Friends;EMILY H., Unidentified Party; and MATTHEW H., Unidentified Party,

Plaintiffs-Appellants,

versus

PLANO INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

R.H., a minor, appeals the denial of tuition reimbursement for private pre-schooling under the Individuals with Disabilities Education Act ("IDEA"). We affirm.

I. The IDEA.

Congress enacted the IDEA to ensure that children with disabilities will have access to public education, including special education and related services. *See* 20 U.S.C. § 1400(d)(1)(A); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). The IDEA requires school districts in states receiving designated federal funds to implement procedures and policies that assure that each disabled student receives a "free appropriate public education," or "FAPE." 20 U.S.C. §§ 1412(a)(1), 1415(a). To ensure that a child receives a FAPE, parents and school districts collaborate to develop an Individualized Education Plan ("IEP") that is "reasonably calculated to enable the child to receive educational benefits."[1]

In Texas, a committee that develops an IEP is known as an Admissions, Review, and Dismissal ("ARD") Committee. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997). The ARD Committee consists of the parents of the child; at least one of his regular education teachers; at least one special-education teacher; a qualified representative of the school district; an individual who can interpret "the instructional implications of evaluation results;" other individuals who have knowledge or special expertise regarding the child (included at the discretion of the parent or agency); and, where appropriate, the child. V.P., 582 F.3d at 580 n.1 (citations omitted). The IDEA does not

---

[1] *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583-84 (5th Cir. 2009) 1 (citation omitted), *cert. denied*, 78 U.S.L.W. 3546 (U.S. Mar. 22, 2010), *see also* 20 U.S.C. § 1415(b)(1).

entitle a disabled child to an IEP that maximizes his potential, but instead only guarantees a "basic floor" of opportunity "specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009) (citations omitted). The educational benefit, however, "cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement." *Id.* (citation omitted).

One of the primary mandates of the IDEA, and the central focus in this case, is "mainstreaming," which is the requirement that an IEP place a disabled child in the least restrictive environment ("LRE") for his education:

> In general[, t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). *See Daniel R.R.*, 874 F.2d at 1039.

"By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the [IDEA]," the requirement that a school district provide a FAPE on the one hand, and the requirement that, on the other hand, it does so within the least restrictive environment. *Id.* at 1044. "Even when school officials can mainstream [a] child," however, "they need not provide for an exclusively mainstreamed environment." *Id.* at 1045. Rather, "the [IDEA] requires school officials to mainstream each child only to the maximum extent appropriate. In short, the [IDEA]'s mandate for [FAPE] qualifies and limits its mandate for education in the regular classroom." *Id.* (citation omitted).

II. Factual Background.

R.H. was born in December 2001. At age two, he received an evaluation through Texas's Early Childhood Intervention ("ECI") program and was deemed eligible for ECI services, namely, speech and occupational therapy.

In June 2004, R.H. began attending TLC, a private preschool, and continued there until December of that year, when his parents convened with officials from Plano Independent School District ("PISD" or "the district") for an ARD committee meeting. At the meeting, R.H. was determined to qualify for IDEA services because of suspected autism and speech impairment. The ARD committee also developed R.H.'s IEP, which proposed placing him part-time in a class at Beaty Early Childhood School ("Beaty") that included both special education and typically

developing students. R.H. would also receive supplemental services, including weekly speech therapy sessions. His parents agreed to the IEP.

R.H. enrolled at Beaty in January 2005 and spent most of the spring semester there. The record reflects that, while at Beaty, he made some progress toward the goals listed in his IEP. Nevertheless, his parents became concerned that he was showing behavioral regression. During a parent-teacher conference in March 2005, they expressed concern about the perceived regression and stated their belief that R.H. needed summer school.

In May 2005, after receiving no response from PISD about their concerns, R.H.'s parents removed him from Beaty and re-enrolled him at TLC. By that time, the spring curriculum had ended at TLC, and R.H. participated in a less structured summer program, which a TLC employee referred to as "play time." R.H.'s teacher at TLC was not certified to teach in Texas public schools, was not certified in special education, and did not have a college degree. TLC did not have a speech or occupational therapist on staff. R.H.'s parents believed, however, that R.H. was better suited to be at TLC, in large part because the ratio of typically developing students to special education students was higher than at Beaty. During the summer, R.H.'s parents obtained private speech and occupational therapy for him.

At the end of the summer, PISD and R.H.'s parents held another ARD meeting to discuss modifications to the IEP. More ARD meetings followed throughout the fall, until January 2006. R.H.'s parents wanted

PISD to provide R.H. with a full day's schedule and 90 minutes of individual speech therapy and 30 minutes of group speech therapy each week. The district instead offered to lengthen R.H.'s school day from 2 hours, 45 minutes to 3 hours, 45 minutes, including supervised lunch time with other students to address some of R.H.'s difficulties with eating. The district also offered 15 minutes of individual speech therapy and 75 minutes of group therapy each week. As an alternative, the district offered a "dual enrollment" option, whereby R.H.'s parents could enroll him at TLC at their own expense but receive supplemental services at Beaty at no cost.

The parties could not reach an agreement. R.H.'s parents requested a due process hearing pursuant to the IDEA, which was held before a special hearing officer in April 2006. At the hearing, R.H. alleged that PISD had denied him a FAPE. Specifically, he alleged that, in developing his IEP, the district had failed to (1) consider the full continuum of placement options, including non-special education environments; (2) offer an appropriate educational program at Beaty during the spring of 2005; (3) place him in the LRE available for his education; and (4) provide him with extended-school-year education for the summer of 2005. R.H. requested reimbursement for his tuition at TLC and privately obtained speech, occupational, and physical therapy from May 2005 onward, as well as an order that PISD continue to pay for tuition and therapy until he began kindergarten in the fall of 2008.

The hearing officer found in favor of PISD on all but the extended-school-year claim. Although the hearing

officer found that the district had improperly denied R.H. services for the summer of 2005, she did not award reimbursement, because R.H. had failed to notify PISD of his intent to enroll at TLC during that period as required by 20 U.S.C. § 1412(a)(10)(C)(iii).

R.H. sued. Both parties moved for summary judgment after agreeing that the evidence in the administrative record was sufficient. The magistrate judge issued a report and recommendation in favor of affirming the ruling of the hearing officer. The magistrate judge found that R.H.'s IEP provided him with a FAPE, including an education in the LRE, and that R.H.'s failure to give notice under § 1412(a)(10)(C)(iii) barred reimbursement for tuition at TLC during the summer of 2005. Over R.H.'s objections, the district court adopted the report and recommendation.

On appeal, R.H. argues that his placement at Beaty violated the IDEA because it was not the LRE for his education and because PISD failed to follow certain procedural requirements of the IDEA. R.H. also contends that the notice requirement, which the district court held barred recovery for summer 2005 tuition, does not apply.

III. Standard of Review.

The district court, reviewing the decision of a hearing officer under the IDEA, accords "due weight" to the hearing officer's findings but ultimately reaches "an independent decision based upon the preponderance of the evidence" that is "virtually de novo." *Michael F.*, 118 F.3d at 252. We review the district court's

decision that the IEP's placement of R.H. at Beaty was appropriate under the IDEA *de novo* as a mixed question of law and fact.[2] The findings of underlying facts, "such as findings that a disabled student obtained educational benefits under an IEP," are subject to clear error review. *Id.* (citations omitted).

The role of the judiciary is not to second-guess the decisions of school officials or to substitute their plans for the education of disabled students with the court's. *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996) (citation omitted). Instead, the court's role is limited to determining whether those officials have complied with the IDEA. Id. (citation omitted). The IDEA creates a presumption in favor of a school district's educational plan, placing the burden of proof, by preponderance of the evidence, on the party challenging it. *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995) (citation omitted).

If there is a violation of the IDEA, we review the district court's decision not to grant tuition reimbursement for abuse of discretion. *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 782-83 (5th Cir. 1998). Because we affirm the finding that PISD did provide R.H. with a FAPE, however, we need not review the denial of reimbursement.

---

[2] *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000) (citation omitted); *see also Brillion v. Klein Indep. Sch. Dist.*, 100 F. App'x 309, 312 (5th Cir. 2004) ("In our view, compliance with the mainstreaming requirement presents a mixed question of law and fact, review is de novo . . . .").

IV. Tuition Reimbursement for the Regular School Year.

Tuition reimbursement for private education is a remedy available to courts and hearing officers where a school district fails to provide a child with a FAPE.[3] To receive reimbursement, R.H. must show that (1) his IEP's public placement at Beaty was inappropriate under the IDEA and (2) his private school placement--in this case, at TLC--was proper under the IDEA.[4]

We determine whether R.H.'s IEP appropriately placed him at Beaty by considering two additional questions. First, did PISD comply with the procedural requirements of the IDEA? And second, was the IEP "reasonably calculated to enable [R.H.] to receive educational benefits?" *Michael Z.*, 580 F.3d at 293 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)).

A. Did PISD Comply with IDEA's Procedural Requirements?

---

[3] "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C.§ 1412(a)(10)(C)(ii).

[4] *Michael Z.*, 580 F.3d at 293; *see also Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12-13 (1993).

R.H. alleges three violations of the IDEA that could be construed as "procedural." He does not explicitly identify them as procedural, perhaps because the district court held that he had not alleged procedural violations in his complaint and had thus waived his right to pursue such claims. Though we are inclined to agree, we review R.H.'s procedural claims, assuming *arguendo* that they were properly raised.

The first such claim is that PISD failed to consider the harmful effects of placing R.H. at Beaty when developing his IEP, as required by "34 C.F.R. § 300.552(d)." That regulation no longer exists. R.H. gives us no information about whether it was effective at relevant times in the past. Because the claim is inadequately briefed, it is waived. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001).

Even if we were to consider the argument, it is directly controverted by the record. R.H.'s IEP from December 2004 contains a standard subsection entitled, "Consideration of Potential Harmful Effects," which indicates that the ARD committee members--including R.H.'s parent--discussed the potential harmful effects of R.H.'s placement at Beaty.[5]

---

[5] The potential harmful effects considered included lack of opportunity for appropriate role models, stigmatization, isolation from peers, diminished access to full range of curriculum, decreased student self-esteem, and decreased access to the instructional opportunities available in integrated settings.

R.H. also alleges that his IEP offered no "explanation of the extent, if any, to which [R.H.] w[ould] not participate with nondisabled children in the regular class," in violation of 20 U.S.C. § 1414(d)(1)(A)(i)(V). Again, the IEP controverts R.H.'s claim. It contains a standard section entitled "Committee Justification for Removal from the General Education," which explains that R.H.'s "needs/behaviors are such that he requires a full-time special education setting" but that he would still be part of a "General Education Campus" with "opportunity to participate with students without disabilities in all nonacademic and extracurricular activities to the maximum extent appropriate." Therefore, R.H. has not met his burden of proving a procedural violation in that respect.

Finally, R.H. claims his ARD committee violated the IDEA's procedural requirements because it did not consider placing him in a "regular," as opposed to special, educational setting with supplementary aids as needed. That argument dovetails with R.H.'s principal substantive claim, that his IEP was not reasonably calculated to deliver educational benefits, because it violated the LRE requirement of the IDEA. Because of that overlap, and because R.H. has not explicitly identified a distinct procedural claim in his briefing, we will consider this claim as part of his allegation that PISD violated the substantive LRE requirement of the IDEA.[6]

---

[6]Citing *Daniel R.R.*, 874 F.2d at 1043, the district court noted that this circuit "has treated the failure to provide a continuum of educational services as a procedural, rather than substantive, violation of IDEA." *Daniel R.R.* is admittedly confusing on the procedural-versus substantive nature of the LRE requirement. One part of that opinion

B. Was the Substance of the IEP Reasonably Calculated?

We move from procedure to substance. The second question we address, in reviewing the appropriateness of R.H.'s placement at Beaty, is whether the substance of his IEP was "reasonably calculated to enable [him] to receive educational benefits." *Michael Z.*, 580 F.3d at 293.

1. The LRE Requirement in *Michael F.* and *Daniel R.R.*

At the outset, we must reconcile some of our precedent. We determine whether an IEP was reasonably calculated using the four factors identified in *Michael F.*, 118 F.3d at 253: (1) Is the program individualized on the basis of the student's assessment and performance; (2) is the program administered in the least restrictive environment; (3) are the services provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) are positive academic and non-academic benefits demonstrated?

---

treats a school district's failure to provide a "continuum" of "alternative placements and supplementary services in conjunction with regular class placement" as a procedural violation. Id. (citation omitted). Another part, however, considers the question "whether the state has taken steps to accommodate the handicapped (continued...)

[6](...continued) child in regular education . . . [using] supplementary aids and services" as a substantive matter. Id. at 1048. For purposes of this case, however, we need not digress into the subtle distinctions between procedural and substantive LRE claims.

R.H. argues, however, that analysis under *Michael F.* is premature until we examine whether his IEP satisfies the statute's LRE requirement. He points to *Daniel R.R.*, 874 F.2d at 1045, in which we said the "two part inquiry"--looking first to procedural violations and second to whether an IEP was reasonably calculated--is "not the appropriate tool for determining whether a school district has met its mainstreaming [i.e., LRE] obligations." We then developed an independent test for satisfying the LRE requirement.

Michael F. and *Daniel R.R.* are not in conflict. *Michael F.* interpreted the LRE requirement as part of the FAPE requirement but did not alter *Daniel R.R.*'s framework for determining whether a school district satisfies the LRE requirement. Our analysis of the second *Michael F.* factor, then, is guided by Daniel R.R.

R.H. did not address the *Michael F.* factors in his briefing, insisting that only *Daniel R.R.* is relevant. As we have just explained, we consider his arguments as relating to the second *Michael F.* factor, whether the IEP satisfied the statute's LRE provision. As for the other *Michael F.* factors, nothing in R.H.'s briefing could be construed as challenging the district court's finding that PISD satisfied the first (individualized program) and third (stakeholder involvement) factors. R.H. does argue that he regressed during his time at Beaty, and this could be construed as a challenge to the district court's finding, under the fourth factor, that R.H. demonstrated positive academic and nonacademic

benefits under his IEP. We therefore review the district court's findings under the second and fourth *Michael F.* factors.

2. Standard of Review Under *Michael F.*

We review the district court's underlying factual findings under each of the four *Michael F.* factors for clear error.[7] We consider de novo any legal issues that arise under the four factors. V.P., 582 F.3d at 584.

3. *Michael F.* Factor Two: the LRE Requirement.

In *Daniel R.R.*, 874 F.2d at 1048, we stated a flexible, two-part test for determining whether an IEP's placement was in the LRE. "First, we ask whether education in the regular classroom, with the use of supplemental aids and services can be achieved satisfactorily for a given child." *Daniel R.R.*, 874 F.2d at 1048. "If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate." Id. At the outset of step one, "we must examine whether the state has taken steps to accommodate the handicapped child in regular education . . . . If the state has made no effort to take

---

[7] V.P., 582 F.3d at 7 583 (reviewing the district court's findings under each *Michael F.* factor, including the LRE requirement, for clear error); *but see Brillion v. Klein Indep. Sch. Dist.*, 100 F. App'x 309, 312 (5th Cir. 2004) ("In our view, compliance with the mainstreaming requirement presents a mixed question of law and fact, [and] review is de novo.").

such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education." *Id.*

R.H.'s central argument is that PISD fails *Daniel R.R.* step one (and thus, *Michael F.* factor two), because the district did not consider placing him anywhere except at Beaty. His class at Beaty, R.H. argues, is a "special education" setting, not a "regular" setting. It follows that PISD took no "steps to accommodate [him] in regular education," as required by the IDEA.

We disagree. The hearing officer found that PISD had considered placing R.H. in a fully mainstreamed environment but rejected that option. That finding was amply supported by evidence offered at the due-process hearing. Susie Vaughn, the principal at Beaty and a member of R.H.'s ARD committee, testified that the committee was aware of R.H.'s previous enrollment at TLC, but because of the needs identified in R.H.'s IEP--a low staff-to-student ratio, a special education teacher with knowledge of autism, regular collaboration with a speech pathologist--the committee could not be confident that the IEP could be implemented in a private school setting, without PISD's direct supervision.

At one point, Vaughn admitted that she personally "did not consider" whether R.H.'s IEP "could be implemented in a typical pre-school setting." But she later clarified, "I wouldn't say that it wasn't that we couldn't consider [implementing the IEP at a private preschool], because we obviously did consider it. It's that we didn't recommend it. We didn't advise that

because we couldn't assure that we could implement that IEP as written in that preschool setting."[8]

The picture that emerges from the due-process hearing transcript is of an ARD committee marshaling a range of resources and services to ensure R.H. a free appropriate public education. As the IEP developed, it seemed apparent to the committee members--including R.H.'s mother--that the best place to implement the plan was at Beaty. The ARD committee was well aware of R.H.'s previous experience in private preschool, but considering all his newly identified needs and newly offered resources, the committee did not recommend that he continue at TLC. The hearing officer thus concluded that R.H. had not met his burden to prove PISD failed to consider a full continuum of placement options.

The district court, giving due weight to the hearing officer's factual findings but still conducting an independent review, left that finding in place and found no violation of either the procedural or substantive requirements of the IDEA. *Michael F.*, 118 F.3d at 252. We review that underlying factual finding for clear error and find none. *Id.*[9] PISD

---

[8] *See* Hearing Transcript 150-53, 224-25.

[9] R.H. argues that the clear-error standard of review is "not as heavy" here, because we stand in the same shoes as did the district court in reviewing the administrative record. *See Sicula Oceanica v. Wilmar Marine Eng'g & Sales Corp.*, 413 F.2d 1332, 1333 (5th Cir. 1969). The distinction is irrelevant, however, because, as our analysis above should make apparent, we would uphold the district court's finding that PISD satisfied *Daniel R.R.* step one even under a more stringent review.

satisfied *Daniel R.R.* step one by considering whether R.H.'s IEP could be satisfactorily implemented in a regular classroom.

We disagree, moreover, with R.H.'s rigid interpretation of *Daniel R.R.* step one, because he ignores an important factual distinction. In *Daniel R.R.*, the district had the option of placing the child in either of two pre-existing public classrooms: a regular pre-kindergarten class or a special education early childhood class. *Daniel R.R.*, 874 F.2d at 1039. R.H. asserts that "PISD offers no mainstream public classes for preschool children." In such a case, he argues, PISD was required to begin with the presumption that it would place him in "[t]he only mainstream placement available," a "'private' placement at a preschool for typically developing children," and remove him from the private setting only if it could not provide a satisfactory education there.

The IDEA, however, makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education.[10] Courts should therefore be cautious before holding

---

[10] 20 U.S.C. § 1400(c)(2)(B) (finding that disabled children were being "excluded entirely from the public school system and from being educated with their peers"); *W.S. ex rel. C.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 148 (S.D.N.Y. 2006) ("Nothing in IDEA compels the school district to look for private school options if the [district], having identified the services needed by the child, concludes that those services can be provided by the public school.").

that a school district is required to place a child outside the available range of public options.

We do not read *Daniel R.R.* to flip the default of the IDEA in favor of a private school placement in this case. *Daniel R.R.* does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class. Since *Daniel R.R.* was decided, none of our decisions involving LRE analysis addressed facts remotely similar to those in this case.[11] A rigid application of *Daniel R.R.* step one, therefore, is not as helpful or persuasive as R.H. contends.

R.H. hangs his LRE argument on a threshold challenge to *Daniel R.R.* step one and has not advanced an alternative argument that PISD failed step two. Accordingly, we affirm the district court's finding that R.H. was mainstreamed to the maximum extent appropriate, and R.H. has not met his burden under *Michael F.* factor two to show that his IEP was not implemented in the least restrictive environment.

4. *Michael F.* Factor Four: Academic and Non-academic Benefits.

---

[11] *See* V.P., 582 F.3d at 586 (concluding that mainstream placement for hearing-impaired child did not provide a FAPE under the circumstances presented there); Brillon, 100 F. App'x at 311-15 (stating that removing a second-grader from mainstream social studies and science classes because he could not keep pace with the curriculum did not violated the LRE requirement).

We move to the fourth factor under *Michael F.*, whether R.H. demonstrated positive academic and non-academic benefits under his IEP. Here again, we agree with the district court that the record has evidence that R.H. made sufficient progress during his one semester at Beaty to show that his IEP was providing a FAPE. R.H.'s teacher testified at the due process hearing, for instance, that R.H. had made progress in a number of areas, including shape recognition, counting, responding to his name, and socializing with other students.

According to R.H.'s parents, he was happier and developing better at TLC than at Beaty. As we have already explained, however, the IDEA does not entitle R.H. to a program that maximizes his potential. *Michael Z.*, 580 F.3d at 292. As long as PISD has provided R.H. with a "basic floor" of opportunity, "specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction," the district has fulfilled its obligations under the law. *Id.*

C. R.H.'s Placement at Beaty Did Not Violate the IDEA.

In summary, R.H. has not shown that PISD violated the procedural requirements of the IDEA, nor has he shown that his IEP was not reasonably calculated to enable him to receive educational benefits. It follows that the IEP's placement of R.H. at Beaty was not inappropriate under the IDEA, and R.H. is not entitled to tuition reimbursement for his time at TLC. We need not and do not decide, therefore,

whether TLC's school-year curriculum offered a proper private placement under the IDEA.

V. Tuition Reimbursement for Summer 2005.

In addition to normal school-year tuition reimbursement, R.H. seeks reimbursement for summer enrollment at TLC in 2005. As explained above, we analyze requests for reimbursement by asking first, whether the IEP's placement (or in this case, lack thereof) was appropriate under the IDEA, and second, whether the private school placement at TLC was proper under the statute. *Michael Z.*, 580 F.3d at 293.

The hearing officer held that PISD violated the IDEA when it failed to respond to the request of R.H.'s parents that the district provide an extended school year for R.H. in the summer of 2005. Nevertheless, the hearing officer held that reimbursement for R.H.'s enrollment at TLC that summer was inappropriate because R.H. had not given notice to PISD that he would be enrolled at TLC during that time period, as required by 20 U.S.C. § 1412(a)(10)(C)(iii). That part of the statute provides, in relevant part, that a court or hearing officer may reduce or deny an otherwise valid reimbursement request if

> at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the

> public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or . . . 10 business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described [above].

20 U.S.C. § 1412(a)(10)(C)(iii)(I). The district court affirmed the denial of reimbursement.

On appeal, R.H. argues, as he did before the district court, that the notice requirement did not apply to him, because PISD never organized an ARD meeting specifically to address his request for an extended school year in 2005. He could not have possibly rejected the placement proposed by PISD per the notice requirement, when there was no summer placement proposal to reject in the first place.

We agree, instead, with the district court that the lack of extended school year services was part and parcel of R.H.'s IEP at the time he re-enrolled at TLC in May 2005, and he was thus required to give notice to PISD of his intent to reject the terms of his existing IEP. We note, moreover, that the decision to award private tuition reimbursement is a matter left to the discretion of courts and hearing officers.[12]

---

[12] 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that "a court or a hearing officer *may* require the [school district] to reimburse the parents for the cost of [private] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available") (emphasis added).

And even if we were convinced by R.H.'s argument that he was not required to give notice of enrollment at TLC for the summer of 2005, we are skeptical that he has met his burden to show that TLC was an appropriate private placement, worthy of reimbursement. The record reflects that TLC's regular curriculum ended in May 2005 and that the summer program was mere "play time."

VI. Conclusion.

PISD satisfied its obligations under the IDEA to develop an IEP for R.H. that offered him a FAPE during the school year. R.H. is barred from receiving reimbursement for private summer preschool tuition, because he did not give proper notice. R.H.'s request for attorney's fees is denied.

There is no error. The judgment is AFFIRMED.

APPENDIX D – PETITION FOR PANEL REHEARINGTO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 10, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

R.H., by his parents and next friends Emily and Matthew H.,	§	
Appellant	§	No. 09-40369 Civil Action No. 4:06-CV-00352
v.	§	
Plano Independent School District	§	
Appellee	§	

R.H.'S PETITION FOR PANEL REHEARING

Appellant R.H. files this Petition for Panel Rehearing pursuant to FRAP 40. The Fifth Circuit opinion issued on May 27, 2010 ("Opinion") contains several substantive errors of law and fact that warrant a different outcome. The overarching error in the Opinion is a failure to apply Daniel R.R. and the mainstreaming requirement of the IDEA, which may be caused in part by particular errors of fact, as set forth below.

Error 1: Reliance on a "finding" that does not exist

The Court mistakenly determined that "the hearing

officer found that PISD had considered placing R.H. in a fully mainstream environment but rejected that option." Opinion, p. 12. In fact, this finding does not exist anywhere in the hearing officer's opinion. See Amended Decision of Hearing Officer [Bates 39-1 Case: 09-40369 Document: 00511138811 Page: 1 Date Filed: 06/10/201052]. The District Court also failed to make this determination.[1] Such a finding is not found in the record and is a substantive mistake of fact because it serves as the cornerstone of the Court's analysis of the LRE requirement – the second Michael F. factor. This substantive mistake of fact also creates an unjustifiable burden for R.H. to defeat since "findings" of the hearing officer must be accorded due weight.

Error 2: Relying on documentation from the wrong year

On p. 9 of the Opinion, the Court states "the IEP"

[1] "The Court need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE." Record Excerpt Tab 2, page 14 of R&R [ROA 704]. The D. Ct. did not comment on PISD's consideration of any other mainstream placement options. Accordingly, the D. Ct. erroneously made a determination about LRE without ever evaluating R.H.'s ability to be mainstreamed. How do we know what R.H.'s LRE is if we don't ask if he can receive a satisfactory education in a regular class?

controverts R.H.'s claim. However, there are two IEPs in the record, one developed in December 2004 to finish out the 2004-2005 school year (P. Exh. 2 [Bates 225-251]) and one for the 2005-2006 school year (last version developed in December 2005 at P. Exh. 22 [Bates 474-494]) which was never agreed to.[2] This lawsuit has only ever concerned the latter IEP, and the parents have only requested reimbursement from the summer of 2005 forward. Significantly, this Court mistakenly cites the December 2004 IEP for justification for removal from the general education, which states that R.H.'s "needs/behaviors are such that he requires a full-time special education setting." This is not the IEP that forms the basis of this lawsuit.

Although the December 2004 IEP is useful to show PISD's predetermination from the very beginning, the relevant December 2005 IEP pages are P. Exh. 22-9 – 22-11 [Bates 482-484]. Importantly, neither those pages nor any other pages in the relevant December 2005 IEP (or prior versions of this IEP for the 2005-2006 school year) include the language cited

[2] This IEP was never agreed to because it did not reflect R.H.'s present levels of performance or unique needs and abilities at that time as evidenced by his success in the regular classroom without many of the resources and services PISD continued to marshal to justify restricting him. See IEE excerpt at P. Exh. 18-14 [Bates 420] also at Record Excerpt tab 15.

by the Court or any other explanation/consideration at all. The cited language of the December 2004 IEP no longer appears since by December 2005, R.H. had been in a regular classroom with supplemental aids and services for 7 months at the parents' expense, and an Independent Educational Evaluation had been conducted that supported this regular classroom placement.[3] See Record Excerpt tab 15; P. Exh. 18 [Bates 407-424].

The child's placement must be determined at least annually. 34 C.F.R. 300.116(b)(1). The parents of disabled children do not have to prove a regular education environment is best for their children; rather, it is the school district's burden to explain in the IEP the extent to which a child cannot articipate in regular education activities. 20 U.S.C. § 1414(d)(1)(A)(iv). PISD failed to do this when it developed R.H.'s IEP for the 2005-2006 school year; it was error for this rt to find the IEP record defeats R.H.'s procedural and substantive allegations.

Error 3: Concluding there are no mainstream public preschool options

The Court mistakenly assumes that a private preschool was the only mainstream option.

[3] The IEE is a guaranteed procedural safeguard for parents that must be considered in any decision made with respect to the provision of FAPE. 34 C.F.R. § 300.502

This is factually wrong. Yet, this mistaken assumption leads the Court to the erroneous conclusion that Daniel R.R. and the LRE mandate of the IDEA do not apply, when this Court states at p. 14 of the Opinion that "Daniel R.R. does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class."

As discussed during oral argument, R.H.'s statement that "PISD offers no mainstream public classes for preschool children" reflects the lack of free public preschools since the compulsory school age for children in Texas is age 6. See Amended Hearing Officer decision at p.8. R.H. briefed mainstream preschool options aside from private school to this Court at p. 43 of his brief, and discussed these options during oral argument.[4] Moreover, R.H.'s parents were not requesting private school, but rather, a mainstream placement.[5]

[4] R.H. argued for other mainstream options to the D. Ct. as well. See, i.e., ROA 316; 583; see also ROA 512; 580.

[5] See PISD's notice of refusals at P. Exh. 11-1 [Bates 279] (parents requested natural ratio of typically developing peers to students with an IEP); P. Exh. 15-3 [Bates 347] (parents requested high volume of peers). A request for TLC is denied for the first time in January, 2006, after the parents requested other mainstream options from PISD for five months. See P. Exh. 19-4 [427].

Finally, it is undisputed that R.H.'s parents never approved the December 2005 IEP nor agreed that Beaty was appropriate, so the Court's statement in the Opinion at p. 13 that R.H.'s mother agreed that the best place to implement the plan was at Beaty is factually wrong.

The most important point is that PISD did have at least three mainstream preschool options at its disposal: regular kindergarten classes, Head Start, and PISD's Early Learning Centers.[6] This is not inconsistent with R.H.'s statement "that PISD offers no mainstream public classes for preschool children":
kindergarten classes are public but not typically for preschoolers; Head Start is community based and not run by PISD; and the Early Learning Centers are not free. But these are all regular settings that PISD can and should use to fulfill its LRE obligations for preschoolers who can be mainstreamed. The lack of free public preschool is not unique to PISD, and districts all over the country use regular kindergarten classes, community preschools, and Head Start to meet LRE for preschoolers. R.H. is not suggesting anything novel.

[6] Even if PISD were to now argue and this Court agree that the Early Learning Centers, regular kindergarten class, and Head Start would all be inappropriate placements for R.H., the violation of IDEA still occurred because PISD did not consider these when they were required to – during the development of R.H.'s IEP, with his parents who must be allowed to participate in all placement decisions. 34 C.F.R. § 300.327.

PISD's tuition-based Early Learning Centers present the most interesting option for PISD to mainstream preschoolers with disabilities as they are preexisting regular education classrooms for preschoolers in PISD and, in fact, one is closer to R.H.'s residence than Beaty. However, PISD never told R.H.'s parents about this option. During the due process hearing, R.H.'s counsel Myrna Silver asked the Beaty principal, Susie Vaughan, whether the district had tuition based alternatives for typically developing students. Ms. Vaughan gave false testimony by completely omitting discussion of PISD's Early Learning Centers.[7] See Vol. II, p. 206-207. However, at first glance, an Early Learning Center appears to provide an ideal mainstream environment for R.H., including the very low student/teacher ratio that PISD insisted R.H. needed only after suit was filed.[8] ROA 134 ¶ 20.[9]

There is no exception in the IDEA that if a "regular class doesn't exist" one may avoid application of mainstreaming laws. States are required to make available a "continuum of alternative placements"

[7] PISD's Early Learning Centers were available at the time R.H.'s 2005-2006 IEP was being developed (see P. Exh. 20-1 [Bates 000430]).

[8] See http://www.pisd.edu/schools/early.childhood/early.learning.shtml.

[9] "ROA" citations refer to the record on appeal which was Bates numbered by the District Court.

which must include regular classes. 34 C.F.R. § 300.115. PISD is either violating this law, or it is violating the law by not considering available mainstream options and instead automatically placing preschoolers with disabilities in special classes. It was error for this Court to disregard these options, which led to a misguided analysis of the law, and to a conclusion that is squarely at odds with Fifth Circuit and Federal law.

Error 4: Failure to determine R.H.'s ability to be mainstreamed

If a child with disabilities has the capability to be educated satisfactorily in a regular classroom, with the use of supplemental aids and services, then the school district must educate that child in a regular classroom. 20 U.S.C. § 1412(a)(5)(A). In determining whether a child can be educated satisfactorily in a regular classroom, with the use of aids and services, the lens is focused on the child.[10] This is consistent with the Federal mandate that "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" can the child be removed from the regular educational environment. Id. (emphasis added).

[10] The Fifth Circuit in Daniel R.R. evaluates in detail whether in a regular education setting the child can receive academic benefit; the child receives nonacademic benefit; and the child is disruptive to other children.

This Court and the school district mistakenly focus their lenses on the school facilities rather than on the child; they mistakenly ask whether the facility and personnel are capable of satisfactorily educating this child rather than whether the child has the capability to be educated in a regular classroom. To date, nobody – not PISD, the hearing officer, the District Court or this Court – has asked or answered the question of whether R.H. had the capability to be educated satisfactorily in a regular classroom, with the use of supplemental aids and services, at the time his second IEP was being developed for the 2005-2006 school year. This Court's focus on the school district's inabilities rather than on R.H.'s abilities is contrary to the Court's opinion in Daniel R.R. and handicaps a child such that the protections of the IDEA are worthless.[11]

Federal policy specifically forbids selecting a placement in a segregated setting over placement in a regular class if the placement decision is based on administrative factors and not on the student's needs. "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as ... configuration of the service delivery system, availability of space,

[11] If we determine whether a child can be mainstreamed only in the context of the placements the school district chooses to offer, schools could always place preschoolers in special education placements by choosing not to offer regular placements.

or administrative convenience."[12] A school cannot use lack of appropriate placements as an excuse for denying students with disabilities their right to an education in the least restrictive environment.[13]

It light of the errors discussed above, it becomes clear that it was also error for this Court to fail to apply Daniel R.R. and ask first whether the child can be mainstreamed, based on his abilities and unique needs. Since the evidence proves he can be mainstreamed, the Court should then ask what public and private options provide this setting. With public options in this case, then PISD must either provide aids and services to accommodate the child in one of those options, or pay for private preschool.[14]

[12] Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12455, 12471 (1999).

[13] Federal Policy Letter on LRE, Education for the Handicapped Law Reporter (EHLR) page 211:384, March 21, 1986; CDE, Office of Special Education, Policy Statement on LRE.

[14] "There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (emphasis added).

However, in no event is it permissible to restrict a child to a special class if his abilities are sufficient to receive a satisfactory education in a regular class with supplemental aids and services, and it was error for this Court toallow PISD to do so, as explained below.

As R.H. has argued, PISD placed him in a full-time special education classroom without first determining whether he had the capability to receive a satisfactory education in a regular classroom environment, which violates the IDEA.[15] 20 U.S.C. § 1412(a)(5)(A); Daniel R.R., 874 F.2d at 1048. The Court relies on the testimony of Beaty's principal, Susie Vaughn that "the committee could not be confident that the IEP could be implemented in a private school setting, without PISD's direct supervision." (emphasis added). This reliance is error first, because this is no evidence that R.H.'s IEP could not be implemented in PISD's Early Learning Centers, regular kindergarten classrooms,

[15] The after the fact justification given by PISD for rejecting the private preschool, as this Court noted, was due to its lack of confidence that it could implement an IEP in the private setting. In addition, an ESL pre-K classroom at Beaty was rejected as inappropriate for R.H., who needed appropriate speech models. Accordingly, it is crucial to recognize that PISD never rejected the possibility that R.H. could be accommodated in a regular classroom with the use of supplemental aids and services for the 2005-2006 school year; so nothing in the record defeats R.H.'s right under the IDEA to be educated in a regular classroom for this year.

or Head Start. Second, PISD's lack of confidence in implementing an IEP in a private preschool does not relieve it of its obligation to mainstream a child to the maximum extent appropriate.[16] 20 U.S.C. § 1412(a)(5)(A).

Further, Daniel R.R. sets forth factors to consider when determining whether a child can achieve education in the regular classroom satisfactorily – it is error that no reviewing Court has applied these factors in this case.[17] This analysis reveals there is no evidence that PISD took any steps to accommodate R.H. in regular education. Even if the Court believes that PISD "considered" the private preschool but just did not recommend it, what steps did PISD take to attempt to implement R.H.'s IEP in that setting? None.[18] The

[16] It is undisputed that R.H. was succeeding in a mainstream environment during the summer and fall of 2005. Why then is PISD permitted to make the leap from assuming a private regular class won't work, to placing him in full-time special education? This is not a continuum of placement options and this predetermination violates the letter and spirit of the IDEA.

[17] R.H. briefed these factors with evidence to the District Court, and to the Fifth Circuit in his opening brief. R.H. will not repeat the evidence again in this petition, as space does not permit.

[18] In another case, the Fifth Circuit found the school district had taken steps to accommodate the child in a regular education setting where it "modified the class assignments, provided a teacher's aide, and worked collaboratively to reinforce concepts" in that regular setting. Brillon v. Klein Independent School Dist., 100 Fed.Appx. 309, 312, (5th Cir. 2004).

ARD documents reveal that PISD assumed from the very beginning that R.H. needed a full-time special education classroom.[19] As the Court of Appeals for the Eleventh Circuit explained in Greer v. Rome, 950 F.2d 688, 698 (11th Cir. 1991), withdrawn for procedural reasons, 956 F.2d 1025 (11th Cir. 1992):

> [T]he critical inquiry is whether the school district took steps during the development of the IEP and placement proposal to accommodate Christy in the regular classroom; we will not consider after-the-fact justifications for a predetermined placement. Our review of the record convinces us that the school district, during the development of the IEP, did not take steps to accommodate Christy in the regular classroom. First, school officials failed to consider the full range of supplemental aids and services, including resource rooms and itinerant instruction, that could be provided to assist Christy in the regular classroom. ... Indeed, the school district's own minutes of the placement committee meetings indicate that school officials considered only three options for Christy: the regular classroom with no supplemental aids and services, the regular classroom with some speech therapy only, and the self-contained

[19] P. Exh. 2-14, 2-18 [Bates 238-242]; P. Exh. 14-12 [Bates 333]; P. Exh. 22-9 [Bates 482].

special education classroom. The school district's consideration of only these limited options does not comply with the mandates of the Act.

PISD failed to consider supplemental aids and services that would allow R.H. to receive his education in a regular setting; this violates Daniel R.R. step one and the IDEA. In order to accomplish the IDEA's mainstreaming requirements, schools must "hire various specially trained personnel to help handicapped children,"[20] such as physical, occupational, and speech therapists.[21] Additionally, a school district must assign a supplementary teacher's assistant to a regular classroom, on a full or part-time basis, if necessary to accommodate the special needs of included children with disabilities.[22]

With respect to the other Daniel R.R. step one factors, there is no evidence that R.H. would not receive educational benefit from regular education and, in

[20] Irving Independent School District v. Tatro, 468 U.S. 883, 893, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664 (1984).

[21] See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 176 (3d Cir.1988), cert. denied, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989); 20 U.S.C. § 1401(a)(16).

[22] See, e.g., Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 813 (9th Cir.1983) (aide ordered for child with cystic fibrosis), cert. denied, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985).

fact, with an IQ of 127 his academic skills exceeded those of his typical preschool peers as he was reading books to his classmates at TLC. Vol. II, p. 112. There is ample evidence that R.H. was not only fully capable of receiving educational benefit but that he was thriving from the regular education placement that his parents funded. There is also overwhelming evidence in this case that R.H. received enormous nonacademic benefits from mainstreaming which were central to his specific deficits such as a speech impairment, just as the Court in Daniel R.R. understood. Finally, there is ample evidence in the record that R.H. did not detrimentally affect the regular classroom environment.

Accordingly, not one, but all of the factors discussed at length in Daniel R.R. support the conclusion that R.H. could have received a satisfactory education in a regular class with supplemental aids and services. Yet PISD proposed only a fulltime special education classroom for R.H.[23] P. Exh. 14-12 [Bates 000333]; P. Exh. 22-9 [Bates 000482]. This alone is a violation of

[23] As previously briefed, PISD's offer of dual enrollment does nothing to defeat this argument since this would not only have been disruptive to transport R.H. during the day for only 15 minutes of individualized speech therapy, but this would have been a denial of FAPE, since R.H.'s parents would have been paying for his preschool. This would defeat IDEA's purpose of ensuring "that children with disabilities receive an education that is both appropriate and free." See Florence County Sch. Dist. v. Carter, 510 U.S. 7, 11, 13, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

the IDEA.

However, even if this Court rejects the evidence, and refuses to apply the step one factors, PISD is still liable for failing to mainstream R.H. to the maximum extent appropriate, pursuant to Daniel R.R. step two.[24] In this case, PISD had thebenefit of documentary and testimonial evidence of RH.'s success in a regular private class with occupational and speech therapy funded by his parents. PISD knew, at the time they were working with the parents to develop the December 2005 IEP, that R.H. was making progress on his IEP goals in a less restrictive setting than the full-time special education classroom they offered. This necessarily means the restrictive setting at Beaty did not mainstream him to the maximum extent appropriate, and it was error for the Court to disregard this violation.

[24] It was error for this Court to disregard Daniel R.R. step two. R.H. has argued extensively that he was not educated in the least restrictive environment, which is just another way of saying he was not mainstreamed to the maximum extent appropriate – Daniel R.R. step two.

Reimbursement

Although no court has yet reached the issue, R.H. is entitled to reimbursement because the parental placement at TLC was appropriate. Parents are entitled to reimbursement if: (1) there is a substantive violation of the IDEA; and (2) the education provided by the private school is reasonably calculated to enable the child to receive educational benefits.[25] Although the panel expressed concern about the lack of special education teachers at TLC, this does not justify a finding that TLC was not an appropriate unilateral placement. See 34 C.F.R. § 300.146(b) and 34 C.F.R. § 300.18(h). In Florence County, the district complained that the private school was inappropriate because faculty members were not state certified and it did not develop IEPs. The Supreme Court stated:

> [T]he § 1401(a)(18) requirements--including the requirement that the school meet the standards of the state educational agency, § 1401(a)(18)(B)--do not apply to private parental placements. Indeed,the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid

[25] See Florence County, 510 U.S. at 15; see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

> parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.

Florence County, 510 U.S. at 14 (citation omitted). Further, there is ample evidence in the record that TLC was appropriate due to his progress there.[26]

> [T]he parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell themseveral years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.

[26] See Record Excerpt Tabs 10-12; 15; 17-18; 25; see also P. Exh. 13-16 [Bates 305-321] (FIE estates "he will likely" benefit from a low student to teacher ratio; all other recommendations can be implemented in the mainstream environment); P. Exh. 18 [Bates 407-423].

Burlington, 471 U.S. at 370. In this case, PISD violated the IDEA by failing to provide R.H. with an LRE.[27] In addition, it is undisputed and PISD has offered no evidence to the contrary that R.H. benefitted significantly, both academically and non-academically, from his mainstream placement. Therefore, the education provided at the private school, supported by the supplementary aids and services funded by his parents, is reasonably calculated to enable R.H. to receive educational benefits - the only standard for a unilateral placement when a school fails to provide the LRE. R.H. respectfully asks this Court to award reimbursement.

Conclusion

This case was not filed to require school districts to pay for private preschool. The private setting was the only mainstream option available to R.H. because PISD failed to offer, make available, or even consider any other mainstream alternative. R.H.

[27] If there is a substantive LRE violation, there is no need to determine if a FAPE was provided.K.B. v. Nebo School District, 379 F.3d 966, 975 (10th Cir. 2004). The IDEA requires both that the child be provided a FAPE and that such a FAPE be provided in an LRE to the maximum extent appropriate. Murray v. Montrose County Sch. Dist., 51 F.3d 921, 925-26 (10th Cir.1995).The IDEA's substantive provision is violated if a FAPE is provided, but not, to the maximum extent appropriate, in the LRE. See 20 U.S.C. § 1412(a)(1), (5); Murray, 51 F.3d at 925-26.

was limited by PISD to a single choice to obtain his education in a regular setting, which happened to be private, and he should not be penalized for this circumstance. This case was filed because a child with disabilities was not educated in the least restrictive environment, be it private or public, a substantive violation of the IDEA. There is no evidence in the record that R.H. could not receive a satisfactory education in a regular education classroom with supplemental aids and services for the 2005-2006 school year.[28] As a result, that is where he had the right to receive his education. 20 U.S.C. § 1412(a)(5)(A). The rules do not change just because the child is a preschooler or because a school district limits the placement options it offers.[29] R.H. can and did succeed in a regular education classroom with assistance – placing him in a full-time special education classroom was thus a blatant violation of the IDEA.

[28] "Indeed, the Act's strong presumption in favor of mainstreaming, 20 U.S.C. § 1412(5)(B), would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from regular classroom." Oberti v. Bd. Of Educ., 995 F.2d 1204, 1219 (3d Cir.1993).

[29] Not only did Daniel R.R. concern a preschooler, but the LRE requirement explicitly applies to all preschoolers with disabilities under Federal law. 34 C.F.R. § 300.116.

The undeniable result of the Opinion is that it is acceptable for R.H. to have been placed in a special education classroom even though his individual needs did not require that restrictive setting, because PISD assumed it could not implement his IEP in a private school and otherwise failed to consider any other mainstream options, much less with the provision of supplemental aids and services. R.H. can not envision a more straight forward violation of the IDEA's LRE requirement and R.H. respectfully requests a ruling in his favor.

Respectfully submitted,

By: Stacy L. Zoern
State Bar No. 24051565
Kut M. Sauer
State Bar No. 17673700
Daffer McDaniel LLP
700 Lavaca, Ste 730
Austin, TX 78701
(512) 476-1400
(512) 703-1250 (fax)
ksauer@dmtechlaw.co,
szoern@dmtechlaw.com

CERTIFICATE OF SERVICE

The undersigned certifies that on June 10, 2010 the following counsel of record for Appellee are being served with a copy of this document via the Court's

CM/ECF system pursuant the FED. R. APP. P. 25(c)(1)(D):

Joe R. Tanguma
WALSH, ANDERSON, BROWN
SCHULZE, & ALDRIDGE, p.c.
P.O. Box 168046
Irving, Texas 75016
Email: jtanguma@irv.wabsa.com

Additionally, the following counsel of record for Appellee is being served on the same date by first class mail.

Nona C. Matthews
WALSH, ANDERSON, BROWN
SCHULZE, & ALDRIDGE, p.c.
P.O. Box 168046
Irving, Texas 75016

Counsel of Record for Defendant-Appellee

APPENDIX E – ORDER DENYING PETITION FOR PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 25, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40369

RH,UnidentifiedParty, by his parents and next friends; EMILY Unidentified Party; H, Unidentified Party,

Plaintiffs -Appellants

v.

PLANO INEDPENDENT SCHOOL DISTRICT,

Defendant -Appellee

Appeal from the United States District Court for the Eastern District of Texas, Sherman

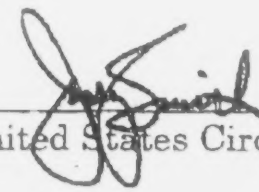
ON PETITION FOR REHEARING

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge